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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-8

MEHENDRA R. MEHTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Mehendra R. Mehta, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The Order of the Court of Appeals is appended to this Petition as Appendix A.

Jurisdiction

The Order of the Court of Appeals (unpublished, per Seventh Circuit Rule 35) was entered on December 7, 1976. Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc, timely filed, was denied on May 31, 1977 (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. May 18 U.S.C. 1001 constitutionally be applied to acts of a lawyer in his role as advocate, or does such application unduly exert a chilling effect upon legal representation in violation of citizens' rights to advocacy?

2. Does application of 18 U.S.C. 1001 to a lawyer as an advocate in an administrative tribunal, where said statutory provision is inapplicable to a lawyer as an advocate in a judicial tribunal, violate due process?

3. May the government circumvent the requirements of *Brady v. Maryland* by affirmative failure to make and/or preserve witness statements?

4. Does *United States v. Costello* justify the government's purposeful presentation of hearsay before the grand jury through one agent and then purposeful failure to have said agent testify, where this deprives a defendant of his constitutional right of confrontation?

5. Did the Court of Appeals misapply *United States v. Agurs*, 427 U.S. 97, where it applied the "raises a reasonable doubt" test instead of the "might have affected outcome" test, where there had been a specific demand for the exculpatory evidence withheld?

6. Has a lawyer-defendant—forced to represent himself at post trial motions—been denied his right to counsel?

7. Was defendant prejudiced by the trial court's failure to make specific findings of fact and conclusions of law upon defendant's request as required by F.R.Cr.P. 23(c)?

8. Was defendant denied a fair trial by the trial court being prejudiced by an out-of-court encounter with defendant before decision?

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions Involved

18 U.S.C. 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

18 U.S.C. Rule 23(c)

Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Statement Of The Case

Petitioner, Mehendra R. Mehta (hereinafter, defendant) was charged in a 10-count indictment (74 CR 415) with having violated 18 U.S.C. 1001. Defendant is an attorney. The charges are based upon alleged false statements contained in certain government forms containing misleading and vague instructions as to their completion, and letters submitted on behalf of aliens seeking permanent resident status in the United States. Jury having been waived, defendant was acquitted by the court on Counts 5, 6 and 8 and convicted on the remaining counts. He was sentenced to a year and a day on Counts 1, 2, 3 and 4, sentences to run concurrently. On Counts 7, 9, and 10, defendant was placed on 3 years probation, to be served consecutive to the sentence imposed on Counts 1, 2, 3 and 4. The indictment is set forth as Appendix C.

Statement Of Facts

The specific facts necessary to an understanding of the issues raised in this petition are fully set forth within the specific Points of the argument to which they are pertinent, and are not repeated herein to avoid unnecessary duplication.

In short, the facts are as follows:

Defendant, an attorney, had been retained by aliens seeking permanent resident status in this country. He stands convicted concerning allegedly false statements contained in certain forms submitted on behalf of said aliens. These statements are alleged to have been made in violation of 18 U.S.C. 1001.

Reasons For Granting The Writ

1.

18 U.S.C. 1001 is unconstitutional as applied to acts of a lawyer as an advocate.

18 U.S.C. 1001 is inapplicable to false statements made by lawyers acting as advocates in federal judicial proceedings. *United States v. D'Mato*, 507 F.2d 26 (2 Cir. 1974); *United States v. Erhardt*, 381 F.2d 173 (6 Cir. 1967); *Morgan v. United States*, 309 F.2d 237 (D.C. Cir. 1961). The Court of Appeals recognized that a lawyer *cannot* be guilty of violating 18 U.S.C. 1001, for acts done during "advocacy" in a *court of law*, but held that he *could* be guilty for acts done during "advocacy" in an *administrative hearing*, because a lawyer can be guilty—in a court—for statements "which pertain to 'action which essentially involves the' administrative or housekeeping functions, not the judicial machinery of the Court." (App. 6a) The opinion of the Court is illogical; for the statute is applicable to "housekeeping" functions because they do *not* involve a lawyer *as an advocate.*

The application of criminal sanctions upon lawyers, as advocates, for acts of advocacy—whether in courts of law or before administrative bodies—substantially diminishes citizens' rights to counsel. An attorney's task as an advocate is to present the facts as best he can for his client; if there is any area open to interpretation as to what is required by a given question, an advocate should be able to respond based on the interpretation of the question most appropriate to his client's interest. *State v. Zwillman*, 112 N.J. Super. 6, 270 A.2d 284 (1970). Lawyers will no longer act as advocates if the threat of prosecution under 18 U.S.C. 1001 is hanging over their heads.

This Court has often recognized that advocacy by lawyers has played a vital role in American democracy. *Anders v. California*, 386 U.S. 738 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).[1]

Advocacy is vital, for it authorizes conduct not permitted by a person not proceeding as an advocate. *Re McConnell*, 370 U.S. 230 (1962); *Maness v. Meyers*, 419 U.S. 449 (1975).

As the right to advocacy is too vital to be chilled by threat of contempt (18 U.S.C. 401), so too this Court must prevent its destruction by threat of prosecution under 18 U.S.C. 1001.

Both due process and equal protection are violated by application of 18 U.S.C. 1001 to acts of advocacy by a lawyer in administrative proceedings, when the statute is not applicable to identical acts in judicial proceedings.

There is no valid distinction between a knowingly false statement by a lawyer before a court, and a knowingly false statement by a lawyer before an administrative agency. No distinction exists, because false statements in court can be prosecuted as perjury. To be the basis for perjury, a false statement must be under oath. It is not necessary that the statement be made under oath for a conviction under 18 U.S.C. 1001. A statute which treats acts, identical in substance, differently, based on an irrational distinction, *i.e.*, whether before a court or an administrative agency, is unconstitutional.

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[1] These cases involve the Sixth Amendment right to counsel in criminal proceedings. However, no distinction exists, for the right to the aid of counsel is recognized in the proceedings here involved, and legal aid in preparing forms (as here involved) is available to all citizens. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

The difference in treatment is so disparate as to be wholly arbitrary and therefore in violation of due process of law and equal protection of the laws. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Schneider v. Rush*, 377 U.S. 163 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

This Court should grant the Writ, to decide this crucial question concerning the right of citizens to advocacy by lawyers.

2.

The procedures used by the government in its investigation in the case at bar—whereby statements of witnesses to investigators either were not taken and transcribed, or were not transcribed until months after the fact or where the original notes were destroyed—operated to deprive defendant of due process of law, by thus depriving him of the opportunity for meaningful exercise of his right to utilize prior statements of prosecution witnesses as part and parcel of his right to cross-examination. In the current context of carte blanche for government-compelled discovery, a sense of decency and fair play requires, at the very least, that the government not render it impossible for a defendant to exercise his Sixth Amendment right to confrontation.

In *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), this Court recognized that the system which pits the prosecution's pre-trial power to obtain evidence[2] against defen-

[2] See, *e.g.: Fisher v. United States*, 425 U.S. 391 (1976) (government can obtain, from defendant's attorney, items in the attorney's possession which were given to him by defendant to aid in preparing tax returns); *Couch v. United States*, 409 U.S. 322 (1973) (government can obtain records from defendant's accountant); *United States v. Miller*, 425 U.S. 435 (1976) (government can obtain defendant's bank records);

(Footnote continued on following page)

dant's limited preparation ability, contains inherent inequities. The *Brady* doctrine,[3] and the requirement that "3500" material be produced, have evolved for the purpose of seeking to neutralize this imbalance. But even more than this; these requirements also exist for the purpose of insuring basic fair play; to render the trial a search for truth. *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

The existing inequities of the present legal system, whereby the government can discover virtually everything while the defendant can obtain virtually nothing, were unconscionably aggravated in the case at bar by the manner in which the government proceeded, so as to prevent defendant from having any possible benefit from the government's pre-trial witness interviews. This denied defendant due process and his constitutional right of confrontation.

* * *

The government effectively prevented defendant from having the use of any prior testimony before the grand jury of witnesses Vora, A. Dave, D. Dave, J. Patel, Mr.

[2] *continued*
United States v. Mara, 410 U.S. 19 (1973) (defendant can be compelled to give handwriting exemplars); *United States v. James*, 493 F.2d 323 (2d Cir. 1974) (prospective defendant can be called to testify before grand jury); *Kastigar v. United States*, 406 U.S. 441 (1972) (government can obtain evidence prior to trial and at trial by compelling witness to testify under limited grant of immunity). See also F.R.Cr.P. 12.1 (defendant can be compelled to advise government of any affirmative defenses and alibi witnesses prior to trial).

[3] *Brady v. Maryland*, 373 U.S. 83 (1963), embodying due process concepts.

[4] *I.e.*, material furnished pursuant to 18 U.S.C. 3500 ("Jencks Act"), a statute promulgated to remedy the problems which required reversal in *Jencks v. United States*, 353 U.S. 657 (1956).

Zeleniak, and Czarneci; this was accomplished because the government did not present these witnesses to the grand jury. Instead, the government presented only Agent White to the grand jury, and then did not call White as a witness at trial. This violated defendant's Sixth Amendment right of confrontation. Reliance by the Court of Appeals on *Costello v. United States*, 350 U.S. 359 (1956) and *United States v. Daras*, 462 F.2d 1361 (9 Cir. 1972), is improper. (App. 3a) For in *Costello* the persons who testified at the grand jury testified at trial, so that there, defendant's right to obtain their testimony as a tool to confront the other witnesses was not denied. *Daras* is invalid, for it wholly misinterprets *Costello.*

Defendant was further denied access to meaningful prior statements of the witnesses, because Agent White failed to make notes of his conversation with the witnesses until 4 to 6 months after his interviews with them, (Tr.H. 168-69), a deviation from White's usual and customary procedures. (Tr. 193-94)

Defendant was further denied prior statements of witnesses because other agents made no notes of conversations with witnesses, (Tr.H. 129, 134, 136-38, 143, 144, 148, 156-59), or destroyed their original notes of such conversations. (Tr.H. 113, 114)

The first and crucial interview with Vora was on March 13, 1974. He was interviewed by Agents White and Johnson. This interview lasted for several hours. (Tr.H. 137) No notes were taken (Tr.H. 135, 137), and no subsequent report was made. (Tr. 196)

Defendant was further denied statements, by the withholding of certain notes (Tr.H. 287, 291, 292, 295, 296, 306, 307), or by summaries being given with items deleted reflecting who was present at the interview and/or the date of the interview. (R. 46, pp. 45, 46, 48, Tr.H. 333)

The totality of the government's actions in proceeding in such a manner as to prevent retention of evidence, in the context of a criminal justice system wherein defendant himself is powerless to obtain evidence, violates due process.

The system which permits the government to compel discovery where defendant cannot, and at the same time permits the government to manipulate the retention of evidence (by not taking notes, and not presenting witnesses to the grand jury, so that defendant cannot obtain evidence), violates due process and his constitutional right of confrontation.

Recent opinions of the Ninth and District of Columbia Circuits have recognized the imbalance, finding no justifiable basis for government agents not to preserve original notes or suffer appropriate sanctions. *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975); *United States v. Harris*, 543 F.2d 1247 (9 Cir. 1976). The Seventh Circuit's decision at bar conflicts with these cases.

This Court should grant certiorari to consider whether due process is violated where the government's affirmative failure to preserve witnesses' statements violates due process.

3.

The opinion is founded upon a totally inaccurate view of the Department of Immigration's discretion in approving an alien for permanent residential status, and upon a misreading of *United States v. Agurs*, 427 U.S. 97.

The Court applied an erroneous test to determine whether defendant's constitutional rights were denied by a prosecutor's withholding of exculpatory evidence. The Court relied upon *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342 (1976), holding that defendant does not have a right to a new trial unless the failure to disclose "is sufficiently significant to result in a denial of defendant's right to a fair trial." (App. 4a-5a) Application of the strict test of *Agurs* violates the holding of *Agurs* itself in a situation as here, where there *had* been a pretrial request for the type of material withheld.

In *Agurs*, this Court held that different standards apply in different situations, as follows: (1) the disclosure would demonstrate possible perjured testimony; Standard: reasonable likelihood . . . would have affected judgment; (2) there *was* a specific request; Standard: might have affected outcome; and (3) there is *no* specific request; Standard: it raises a reasonable doubt, *i.e.*, "sufficiently significant."

Here, a request *was* made and this involves a "corruption of the truth seeking process," *i.e.*, "the veracity of the prosecution witness" (49 L.Ed.2d 342, at 350), and hence standard No. 1, not No. 3, is applicable.

Prior to trial, defendant moved:

> "for an order compelling the attorney for the Government to disclose any promises, inducements, agreements of leniency or dismissals of prosecutions, or monetary inducements made to any Government witness or said witness' attorney or authorized agent which is directly or impliedly consideration for said Witness' testimony in the above captioned case." (R. 12)

In its Response to said motion, the government stated:

> "No promises, inducements, agreement of leniency, dismissals of prosecutions or monetary inducements have been made to any government witness or his attorney or agent as direct or implied consideration for said witness' testimony in the above-captioned case." (R. 15)

However, in its Response to defendant's post-trial motion, in answer to defendant's allegation that witnesses Vora and Dave were given undisclosed inducements in the form of an official decision not to deport them, the government admitted that a decision not to deport was made—but claimed that defendant knew of such before trial.

The government stated:

> "The defense certainly knew prior to trial . . . that the Government had no plans to deport either individual." (R. 62, p. 3)

This statement directly conflicts with the government's earlier position that no inducements had been made to either witness and that the witnesses were testifying "under the threat of deportation." (Tr. 78, 219-20)

The government's decision not to deport either individual is material possibly affecting the fact-finder's determination of the credibility of government witnesses which must be disclosed. *Mooney v. Holohan*, 294 U.S. 103 (1934); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. McCrane*, 527 F.2d 906 (3 Cir. 1975); *United States v. Harris*, 462 F.2d 1033 (9 Cir. 1972); *United States v. Kaplan*, 470 F.2d 100 (7 Cir. 1972).

Defense counsel has a right to examine a key prosecution witness as to the existence of any "deals" with the prosecution, whereby he expects to gain some advantage in exchange for his testimony. *Giglio v. United States*, *supra*; *DeMarco v. United States*, 415 U.S. 449 (1974); *Napue v. Illinois*, 360 U.S. 264 (1959). See *United States v. Guerts*, 53 F.R.D. 26 (E.D. Wis. 1971).

The prosecution caused the court to believe that the threat of deportation was hanging over each witness' head; not that a "deal" had been made, that the witness would not be deported. (Tr. 977) The situation is comparable to a witness testifying that no promise concerning prosecution had been made, where the witness knew that the government had in fact decided to drop criminal charges or to recommend probation.

The panel's opinion inaccurately assumes that once the Department of Labor has issued a labor certificate, permanent resident status follows automatically. The issue of Labor Certification is an administrative ruling decided by the U.S. Department of Labor, not by the Immigration Service. The determination involves such factors as job availability for American citizens, wages, minimum vocational requirements, including what is contained in the forms submitted by the applicants. *The immigration service has discretionary power to deny permanent resident status, whether or not a Labor Certification has issued. The immigration service could—and normally would—deny the grant of such permanent status to applicants like Dave and Vora, who admittedly have violated immigration laws.* (Tr. 60-70, 816-25)

The decision of the Immigration and Naturalization Department—the de facto prosecutorial agency—not to deport was an awarding of "prosecutorial leniency."

The government's determination not to deport either individual, made prior to their testimony, was an inducement for their testimony. It had to be disclosed, under *Agurs*, *supra*, for Vora and Dave were the government's crucial witnesses. If they were disbelieved, no conviction could be had. Due process was denied by the government's failure to disclose the full extent of its intentions toward these witnesses.

The court's refusal to hold a hearing as to inducements, (Tr.H. 6), together with its refusal to make the required findings of fact (see Point 5, *infra*), rendered any intelligent appellate determination impossible.

Certiorari should be allowed, to permit this Court to resolve the questions concerning *Agurs* posited by the Seventh Circuit's order.

4.

Defendant was denied assistance of counsel.

The opinion below fails to discuss the impropriety that defendant was forced to proceed in post-trial motions without counsel because his counsel *opposed* his position at the post-trial hearing. (Tr.H. 9-10, 14-15, Jan. 19, 1976; Tr.H. 263-65; Tr.H. 6, Dec. 4, 1975; Tr.H. 3, Dec. 18, 1975; Tr.H. 9, Jan. 19, 1976) A defendant's constitutional right to effective assistance of counsel, which applies to post-trial proceedings, is not diminished because defendant is a lawyer. *United States v. Hamilton*, 451 F.2d 1013 (2 Cir. 1971). There never was a waiver of his right to counsel. This cause must be remanded for a new post-trial proceeding to be conducted for defendant by competent counsel.

There were substantial hearings at post-trial motions relative to the government's withholding of evidence. Thus, these hearings were crucial stages of the proceedings to which the Sixth Amendment right to counsel applies.

5.

The trial court refused to make specific findings of fact and law as required by F.R.Cr.P. 23(c), and the Court of Appeals refused to rule on this issue. Defendant was prejudiced by the court's failure to make the required findings.

Title 18 U.S.C., Rule 23(c) requires a trial court to make specific findings in a bench trial. *United States v. Livingston*, 459 F.2d 797 (3 Cir. 1972). Defendant's post-conviction request for such specific findings was denied. Here, necessary for appellate review were both findings of facts and statements of controlling law. Compare *United States v. Sicilia*, 457 F.2d 787 (7 Cir. 1972).

In *Morrissey v. Brewer*, 407 U.S. 471 (1972), in regard to parole revocation hearings, this Court held that due process required "a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole." *Id.* at 489. Surely due process must require no less by a judge upon a finding of guilty. See also *King v. United States*, 492 F.2d 1337 (7 Cir. 1974).

It was essential that such findings and conclusions be entered, in light of the necessity for appellate review of other points raised in defendant's appeal[5] and to insure

[5] Among the Points raised in the appeal, for a proper determination of which, we submit, findings of fact and conclusions of law were necessary, were the following (numbered as in the original Brief):

8. The evidence is insufficient to sustain conviction on Counts 1 and 3 because the government failed to prove that the statements were literally untrue per *Bronston v. United States*, 409 U.S. 359 (1973), and *United States v. Lozano*, 511 F.2d 1 (7th Cir. 1975). There was evidence supporting defendant's theory that the statements forming the bases of Counts 1 and 3 were not "literally untrue". See Tr. 268, 280-81, 288-29, 293, 776, 804-05, 662-64, 302. See Def. Br. pp. 34-38.

(Footnote continued on following page)

that the court was not prejudiced by an out-of-court encounter with defendant and a government rebuttal witness (Rothman), who did not appear to testify. That the incident appeared most prejudicial to the trial court is demonstrated by the lengths with which he proceeded to explain his lack of prejudice. He "doth protest too much, methinks." (App. D)

Absent his specific finding of facts and conclusions of law, it is impossible for a reviewing court to evaluate his assertion of lack of prejudice.

Absent the trial court's findings of fact and conclusions of law as to the issues as above set forth in footnote 5, there could be no meaningful appellate review of those issues. Hence the trial court's refusal to make findings, and the Court of Appeals' failure even to rule on this issue, was prejudicial to defendant, and cannot be dismissed as mere "harmless error."

[5] *continued*

9. The evidence is insufficient to sustain conviction on Counts 7, 9 and 10 absent proof of falsity, upon the same theory as just set forth; see Tr. 375, 379, 983-84.

10. The government failed to prove that the alleged false statements were material. (A) the convictions upon Counts 1, 2, 3 and 4 must be vacated, where the result would have been the same had the statements not been made; (B) The proof fails to demonstrate that the alleged false statements were "material"; (C) There was no proof that the alleged statements had a general tendency to influence; (D) The government failed to prove materiality of the alleged false statements in Counts 2 and 4; (E) The government failed to prove the materiality of the alleged false statements in Counts 1 and 3.

11. The evidence is insufficient on Counts 1, 2, 3 and 4, where the government witnesses were not credible and were admitted liars.

6.

Due process was denied by the court being prejudiced by an encounter in an elevator with defendant and Mr. Rothman, a proposed government witness.

Judge Marshall, prior to decision, encountered defendant, his lawyer and Rothman, a proposed government witness, in an elevator. The court's statement concerning this incident is set out in Appendix D. The court's disclaimer of prejudice cannot remove the prejudicial effect of this incident. He is human and must surely have been prejudiced.[6] His prejudice is evident from his continued need to disclaim prejudice. Here, where prejudice is apparent and there is no specific finding of facts (see Point 5) sufficient to prove he was not prejudiced, the conviction violates due process.

Conclusion

For any or all of the foregoing reasons, a Writ of Certiorari should be issued to review the judgment of the Seventh Circuit.

Respectfully submitted,

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Chicago, Illinois 60601
Attorney for Petitioner

[6] "The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious." *United States v. Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972).

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Nos. 76-1100 and 76-1349
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAHENDRA R. MEHTA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
75 CR 415—**Prentice H. Marshall**, *Judge.*

ARGUED SEPTEMBER 15, 1976—DECIDED DECEMBER 7, 1976

Before SPRECHER, and WOOD, JR., *Circuit Judges*, and GRANT, *Senior District Judge**

ORDER

Defendant-Appellant Mahendra R. Mehta was convicted on seven of ten counts of an indictment of making false statements to the government in violation of 18 U.S.C. § 1001. The indictment alleged that Mehta made

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

false statements to the United States Department of Labor and the Immigration and Naturalization Service on behalf of four aliens who were attempting to obtain permanent resident status in the United States.

After conviction in a bench trial before Judge Prentice H. Marshall of Counts 1, 2, 3, 4, 7, 9, and 10, Defendant-Appellant Mehta's trial counsel filed a post-trial motion for judgment of acquittal or a new trial. Prior to sentencing, Mehta filed several *pro se* motions for judgment of acquittal or a new trial. After conducting a hearing as to whether the government had produced all Section 3500 material, Judge Marshall found that the government had complied fully with 18 U.S.C. § 3500 and denied all of the defendant's post-trial motions. The defendant then retained new appellate counsel and brought this appeal. In his appellate brief, the defendant raises a host of alleged errors.

Misconduct by the Government:

The defendant stresses that the government has committed misconduct in that it precluded him from access to meaningful summaries of witnesses' pretrial statements, misled him as to the nature of promises made to governmental witnesses and failed to disclose exculpatory material about the defendant.

As regards the statements of witnesses before trial, the defendant alleges a deprivation of due process on the grounds that the government agents made no notes of some conversations and destroyed their original notes of others. Additionally, he contends that the government, by having Agent White testify to the Grand Jury, intentionally precluded the defense from acquiring prior testimony of the other witnesses.

The Supreme Court has rejected the argument that an indictment based on hearsay evidence is constitutionally invalid. *United States v. Costello*, 350 U.S. 359 (1956). We agree with the defendant that the presentation of hearsay evidence of an investigating officer in lieu of readily available testimony by direct witnesses is not a particularly desirable or a preferred procedure. However, in the absence of a showing that the integrity of the Grand Jury proceeding has been impaired, an indictment founded exclusively on such testimony is neither unconstitutional nor inherently wrong. *United States v. Cruz*, 478 F.2d 408, 411 (CA 5 1973). We find no such impairment in this case and are, therefore, unpersuaded by defendant's arguments in this regard.

Similarly, it was not error to refuse disclosure of the Grand Jury testimony of Agent White. The Jencks Act specifically provides that testimony of a Grand Jury witness is not available until after trial testimony has been completed. Since Agent White did not testify at trial, the government was not obliged to disclose his testimony. *United States v. Daras*, 462 F.2d 1361 (CA 9 1972), *cert. denied*, 409 U.S. 1046 (1972).

Defendant also maintains that his due process rights were violated by the manner in which the government interviewed and preserved statements. This court, however, has held that 18 U.S.C. § 3500 "does not require government agents to preserve their notes after they have been transcribed and their reports checked for accuracy." *United States v. Spatuzza*, 331 F.2d 214 (CA 7 1964); *United States v. Harris*, et al., Slip Opinion, No. 75-1360, et al., (CA 7 October 12, 1976), p. 6. Consequently, we find no reversible error in the government's preparation of the case.

Failure to Disclose Exculpatory Information

The defendant alleges that the government improperly failed to disclose exculpatory information by (1) improperly withholding promises to Messrs. Vora and Dave, and (2) not disclosing evidence demonstrating that the defendant had proceeded in an honest fashion in other immigration matters.

The Supreme Court has held that a prosecutor is under a duty to disclose exculpatory information about a criminal defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). The court has construed this obligation to include both a duty to correct false testimony (*Napue v. Illinois*, 360 U.S. 264 (1959)) and a duty to reveal promises of prosecutorial leniency to government witnesses. *Giglio v. United States*, 405 U.S. 150 (1971). Most recently, the court held that a prosecutor does not violate his constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. *United States v. Agurs*, 44 L.W. 5013 (1976). It is the character of the evidence and not the character of the prosecutor which results in constitutional error. *Id.* at 5017.

In the case at hand, Messrs. Dave and Vora testified for the government and were cross-examined about their immigration status. Subsequent to their dealings with the defendant, both of them petitioned the Department of Labor for labor certifications based upon their actual jobs. Those applications were approved and they became eligible to apply for permanent resident status. The approval of their requests was an administrative ruling upon the merits of their claims by the Department of Labor and not an awarding of prosecutorial leniency. The fact that the government processed their labor certificates cannot now be transformed into a nondisclosure of exculpatory information. Judge Marshall found that "in all respects these two witnesses were effectively cross-examined in regard to their immigration status". (P. Tr 8.) We find no sufficient grounds on which to overturn that finding.

The defendant also contends that the government was under a duty to disclose other immigration cases that the defendant handled honestly. The case cited by the defendant, *United States v. Shavin*, 287 F.2d 641 (1961), does not support this proposition. *Shavin* stands only for the proposition that the defendant has a right to introduce evidence of honest dealings in refuting allegations of fraudulent intent. Presumably, an indicted attorney is aware of other transactions he has handled. To read *Brady* as requiring a complete disclosure of a defendant's prior noncriminal behavior is both misplaced and fatuous.

Effective Assistance of Counsel

Defendant enumerates a multitude of factors that he contends amounted to a denial of "the minimum standard of professional representation" required by this court. *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (CA 7 1975). This standard, while less stringent than the former "farce of mockery" standard, does not countenance or mandate a replay of trial strategy by way of hindsight. Judge Marshall concluded that the case was "well-tried". (Tr. 988-989.) None of the matters alluded to by the defendant either singly or cumulatively are so egregious as to indicate a lack of adequate representation of counsel.

Adequacy of the Post-Trial Hearing

The defendant complains that the trial court erred in not permitting an extensive evidentiary hearing on his post-trial motion, not requiring the production of Agent White's testimony, not inspecting notes made by the Assistant U. S. Attorney, denying a continuance of the post-trial hearing, and not excluding government attorneys at the hearing.

In reviewing the defendant's assignments of error, we find no constitutional deprivations or abuse of discretion on behalf of the trial judge. It is clear to this court that an extensive post-trial hearing was conducted and that the defendant was extended wide latitude in which to pursue possible sources of misconduct. He is not, however, entitled to a complete rehearing of the case. We find no substance to the defendant's claims about the hearing.

Constitutionality of the Application of 18 U.S.C. § 1001

Defendant avers that there is no legitimate distinction between knowingly false statements before a court (to which 18 U.S.C. § 1001 has been held inapplicable) and knowingly false statements before an administrative agency. Furthermore, he notes that government prosecutors are not subject to 18 U.S.C. § 1001.

Although we agree that the statute has not been extended to encompass statements by a lawyer during judicial proceedings (*United States v. D'Mato*, 507 F.2d 26 (CA 2 1974)), the courts have extended the statute to include statements to courts which pertain to "action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court". *Morgan v. United States*, 309 F.2d 234, 237 (CA D.C. 1962), *cert. denied*, 377 U.S. 917 (1962). We find no unconstitutionality in the application of the statute to the defendant.

Allegation of Materiality in the Indictment

Conceding that the indictment did allege that the false statements were material, the defendant nevertheless insists that the indictment did not charge materiality with sufficient specificity. However, it is only necessary that an indictment allege materiality in substance and the indictment will be upheld if the facts alleged therein "warrant an inference that the false statement is material." *United States v. McGough*, 510 F.2d 598, 603 (CA 5 1975). We find no inadequacy in the indictment.

Sufficiency of the Evidence

Defendant questions the sufficiency of the evidence in a number of areas and petitions for a reversal of the conviction on this ground. Specifically he attacks the statements on the MA7-50B Forms for Vora and Dave, the future wage offer statements on Patel's 50B Form, the proof as to the materiality of the allegedly false statements and, lastly, the credibility of the government witnesses.

Rule 23(c) of the Federal Rules of Criminal Procedure mandates a court to make general findings of fact where a case is tried without a jury. Additionally, a judge must make special findings of fact if these are requested by a party.

Unlike its corresponding Civil Rule analogue (Rule 52(a)), Rule 23 does not state the effect which must be accorded to findings in a criminal bench trial. This circuit has distinguished between findings on the ultimate issue of guilt and findings on matters other than guilt. Where the record discloses "substantial evidence", a finding of guilt will not be overturned. *United States v. Owen*, 231 F.2d 831, 833 (CA 7 1956). Findings on matters other than guilt in a jury-waived criminal case will not be disturbed unless they are

"clearly erroneous". *United States v. Tallman*, 437 F.2d 1103, 1105 (CA 7 1971). Additionally, this court has made it clear that in reviewing bench trials it will "not function as a super-fact-finding tribunal". *Owen*, *supra*.

The record in this case is an extensive one and Judge Marshall obviously heard testimony from many sources. Judge Marshall made numerous findings of fact contrary to the claims made by the appellant. We are of the opinion that there is substantial and significant evidence on which Judge Marshall could predicate his findings and conclusions. The evidence was not insufficient and we find no grounds for reversible error.

Validity of the Jury Waiver

The defendant contends that he did not make a knowing and intelligent waiver of his right to a jury trial as required by the Supreme Court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). A jury waiver is knowingly made when the defendant is aware of the right waived and the legal effect of electing a bench trial. It is not necessary that the defendant be able to foresee the entire panoply of evidence to be introduced or adduced at trial. There is no evidence that the defendant, a practicing attorney, was ignorant, induced or coerced by promises, incompetent or unappreciative of the gravity of the offenses. *United States v. Mitchell*, 427 F.2d 1280, 1282 (CA 3 1970).

For the reasons discussed above, the judgment and sentence of the district court should be and are hereby AFFIRMED.

APPENDIX B

AMENDED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1977

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 76-1100 and 76-1349 (Consolidated)

MAHENDRA R. MEHTA,

Defendant-Appellant.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division.
No. 75 CR 415
Prentice H. Marshall, Judge

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by Appellant Mehendra R. Mehta, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

MAHENDRA R. MEHTA

No. _____
Violation: Title 18, United States Code, Section 1001

The JUNE 1975 GRAND JURY charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jayendra P. Vora, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 13, 1973, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, false, fictitious and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the United States Department of Labor and the Immigration and

Naturalization Service, to wit: a "Job Offer for Alien Employment," Form MA7-50B, submitted on behalf of Jayendra P. Vora, signed by George Fried as manager (owner) of Michael T.V. & Radio Service, Chicago, Illinois, and dated March 13, 1973. The aforesaid false, fictitious, and fraudulent statements and representations as to material facts made in said Form MA7-50B were as follows:

(a) On line 8, the annual sales or income of Michael T.V. & Radio Service was listed as $75,000.00;

(b) On line 17, it was stated that George Fried learned that the alien was available for employment through personal contact with the alien; and

(c) On lines 28 and 29, it was stated that Mr. Vora would receive $4.25 per hour for 40 hours of work per week.

In violation of Title 18, United States Code, Section 1001.

COUNT TWO

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jayendra P. Vora, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 6, 1973, at Chicago in the Northern District of Illinois, Eastern division,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Statement of Qualifications of Alien," Form MA7-50A, submitted on behalf of Jayendra P. Vora, and dated March 6, 1973. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50A was as follows: that during the period between June, 1968 and June, 1969, Mr. Vora's duties at Ambica Mills, Ltd, Baroda, India, included testing and calibrating the electrical instruments;

In violation of Title 18, United States Code, Section 1001.

COUNT THREE

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Arunkumar M. Dave, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 13, 1973, at Chicago, in the Northern District of Illinois, Eastern Division,

defendant herein, wilfully and knowingly did make, and cause to be made, false, fictitious, and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Job Offer for Alien Employment," Form MA7-50B, submitted on behalf of Arunkumar M. Dave, signed by George Fried as manager (owner) of Michael T.V. & Radio Service, Chicago, Illinois, and dated March 13, 1973. The aforesaid false, fictitious, and fraudulent statements and representations as to material facts made in said Form MA7-50B were as follows:

(a) On line 8, the annual sales or income of Michael T.V. and Radio Service was listed at $75,000.00;

(b) On line 17, it was stated that George Fried learned that the alien was available for employment through personal contact with the alien; and

(c) On lines 28 and 29, it was stated that Mr. Dave would receive $4.25 per hour for 40 hours of work per week;

In violation of Title 18, United States Code, Section 1001.

COUNT FOUR

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Arunkumar M. Dave, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about March 3, 1973, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Statement of Qualifications of Alien," Form MA7-50A, submitted on behalf of Arunkumar M. Dave, and dated March 3, 1973. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50A was as follows: that during the period between August, 1967 and February, 1972, Mr. Dave was an Electrical Technician at Kinarivala R.J.K. Industries, Behind Anil Starch Ahmedabad, India, and that his duties included testing and calibrating electrical instruments;

In violation of Title 18, United States Code, Section 1001.

COUNT FIVE

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Babubhai K. Amin, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about January 14, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Statement of Qualifications of Alien," Form MA7-50A, submitted on behalf of Babubhai K. Amin, and dated January 14, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50A was as follows: that during the period from August, 1973, to January 14, 1974, Mr. Amin supervised other employees of Pfanstiethl Laboratories, Waukegan, Illinois, where he was employed;

In violation of Title 18, United States Code, Section 1001.

COUNT SIX

The JUNE 1975 GRAND JURY further charges:

On or about January 14, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent

statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, departments and agencies of the United States, in that he stated in a letter from himself to the Illinois State Employment Service, Alien Employment Certification Branch, Chicago, Illinois, dated January 14, 1974, that Pfanstiethl Laboratories, Waukegan, Illinois, was his client;

In violation of Title 18, United States Code, Section 1001.

COUNT SEVEN

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jagdishbhai N. Patel, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about February 14, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a "Job Offer for Alien Employment," Form MA7-50B, on behalf of Jagdishbhai

N. Patel, signed by John Zeleniak as operation manager of Thybony Wall Coverings, Chicago, Illinois, and dated February 14, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said Form MA7-50B was as follows: that on line 29, it was stated that Mr. Patel would be paid $5.50 per hour by Thybony Wall Coverings;

In violation of Title 18, United States Code, Section 1001.

COUNT EIGHT

The JUNE 1975 GRAND JURY further charges:

On or about February 20, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, departments and agencies of the United States, in that he stated in a letter from himself to the Illinois State Employment Service, Alien Employment Certification Branch, Chicago, Illinois, dated February 20, 1974, that Thybony Wall Coverings, Chicago, Illinois, was his client;

In violation of Title 18, United States Code, Section 1001.

COUNT NINE

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for

Jagdishbhai N. Patel, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about August 15, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a letter from John Zeleniak, operation manager, Thybony Wall Coverings, Chicago, Illinois, to William F. Browne, Acting Certifying Officer, United States Department of Labor, Manpower Administration, relating to Jagdishbhai N. Patel, and dated August 15, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said letter was as follows: that Thybony Wall Coverings would pay Jagdishbhai N. Patel $6.30 per hour;

In violation of Title 18, United States Code, Section 1001.

COUNT TEN

The JUNE 1975 GRAND JURY further charges:

1. At all times herein relevant, the defendant, MAHENDRA R. MEHTA, was acting as an attorney for Jagdishbhai N. Patel, an alien applying for permanent resident status in the United States.

2. At all times herein relevant, the United States Department of Labor and the Immigration and Naturalization Service were and are departments and agencies of the United States.

3. On or about October 7, 1974, at Chicago, in the Northern District of Illinois, Eastern Division,

MAHENDRA R. MEHTA,

defendant herein, wilfully and knowingly did make, and cause to be made, a false, fictitious, and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Labor and the Immigration and Naturalization Service, to wit: a letter from John Zeleniak, operation manager, Thybony Wall Coverings, Chicago, Illinois, to William F. Browne, Acting Certifying officer, United States Department of Labor, Manpower Administration, relating to Jagdishbhai N. Patel, and dated October 7, 1974. The aforesaid false, fictitious, and fraudulent statement and representation as to a material fact made in said letter is as follows: that Thybony Wall Coverings would pay Jagdishbhai N. Patel $6.30 per hour;

In violation of Title 18, United States Code, Section 1001.

A TRUE BILL;

/s/ _____
FOREMAN

UNITED STATES ATTORNEY

SPH:ja

APPENDIX D

Before I get into the merits of the case, I want to make a statement regarding an incident which occurred on Thursday evening, as I was leaving the building.

After I got on the elevator to go downstairs I realized I was in a car with the defendant Mr. Mehta, Miss Kassam, another woman who had been in attendance throughout the trial, and who I assume is Mr. Mehta's wife, Mr. Frazin, Mr. Weiner and a sixth person.

I don't think Mr. Romanoff was there. If he was I missed him.

The sixth person, who is a man—I found that an awkward situation. I really don't know as I sit here now whether I was cognizant who was in the car when I got on it. I was in a hurry, and I came out the frosted doors and saw a car open and the red light down on, and I called to hold the car, and we all ended up together, and it was awkward.

The man who I did not recognize was saying something. I don't know what it was, because I truly didn't hear it. I was looking down at the floor, I think in sort of a response to the awkwardness of the situation.

I became aware of the fact that Mr. Mehta was sort of kicking the man, I am sure in an effort to get him to stop talking. He may have said something to the man, too, but if he did I did not hear it.

To dispel the awkwardness of the situation, I tried to strike up a conversation with Mr. Frazin with regard to a case that I understood he had recently tried with Judge Aspen of the State Court and which was videotaped.

The unidentified man kept talking, and Mr. Frazin, true to his calling, took charge of the situation and introduced the man to me, and me to the man.

The man was Mr. Rothman, the Government anticipated rebuttal witness. Mr. Rothman was immediately visibly shaken upon learning that I was the judge in the case in which he had failed to appear. He took his wallet out, displayed a card which he said were his credentials as a State Hearing Officer, and he beseeched me to believe him that he had been engaged in a hearing which prevented him from appearing at the trial.

I did not respond to his entreaties. I continued to engage Mr. Frazin in the conversation about the televised trial.

All of this took place in the time it takes an elevator car to descend from this floor, the 21st, down to the first floor.

When the car reached the main floor, I got out and headed for the building exit.

Mr. Rothman, who had continued to implore me to believe him as the car descended, ran along beside me displaying his State credentials and saying something to the effect that he would not want me to think ill of him should he ever appear before me.

Again, I did not respond to Mr. Rothman.

The following morning, my Clerk, Mr. Knox, advised me that Mr. Mehta was in the outer office and wanted to see me. Mr. Knox advised Mr. Mehta that I would not see him, but he came in to me to double check, and, of course, I declined to see Mr. Mehta.

The whole incident was a most unfortunate one.

However, I want to assure all concerned that I overheard and saw nothing in the car other than what I

have stated here, and that the incident has had no effect on my decision.

We tell jurors to put out of mind everything that they may see or hear about a case and its participants, other than that which they see and hear in the courtroom, and we should proceed upon the same assumption as far as judges are concerned. We assume that jurors abide by our instructions, and certainly we should expect no less of judges.

I want to turn, then, to the merits.

* * *

Mr. Frazin: One other thing, Judge: Your Honor has already discussed it. The matter of Rothman was as much a surprise to me as it was to you.

I hadn't seen that fellow before. The incident that happened Thursday was done without defense counsel's knowledge at all—Friday. And I hit the ceiling over one, because it was something that happened, and we were not consulted.

The Court: Now, I made the statement for the record so that everyone would know that I was cognizant of it. (Tr. 974-78)